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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 DIVISION PTB HON. WARREN R. DARROW **DEFENDANT JAMES ARTHUR RAY'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE WITNESS OPINION ON ULTIMATE ISSUE**

I. INTRODUCTION

The State "agrees," as it must, that "witnesses may not testify as to their opinion on the guilt or innocence of the Defendant, nor may they testify as to their opinion of the credibility of a witness." Response at 2:8–9. Yet the State also suggests that it intends to introduce at trial some witness opinions on ultimate issues, and that its attempt to do so would be consistent with Arizona law. *See id.* at 3:6–7. To be sure, a court may decide to admit an opinion on an ultimate issue if the opinion is "***otherwise admissible***." Ariz. R. Evid. 704. (emphasis added). But this

means that to be admitted into evidence, opinions on ultimate issues must satisfy the other evidentiary rules limiting the use of opinion evidence. As the Comment to Rule 704 specifically states, "[s]ome opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases." Ariz. R. Evid. 704, comment. Many witness opinions the State has elicited so far fall squarely within the category of opinions that must be excluded.

II. ARGUMENT

The lay opinions on ultimate issues that the prosecution has elicited to date are not "otherwise admissible" and therefore must be excluded. Ariz. R. Evid. 704. Under Arizona law, admissible lay opinions "are limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Arizona R. Evid. 701. The ultimate-issue opinions the State has disclosed in this case meet neither criteria.

In its witness interviews and at the *Terrazas* hearing in this case, the State elicited numerous lay opinions regarding whether Mr. Ray was reckless or negligent, and whether he caused the deaths at issue. *See, e.g.*, Transcript of Interview of Randall Potter, 10/24/09, at 43:1–5 ("Potter: "And you know I would say that yeah there's, there's negligence on their part and they should have taken different measures from the beginning and, and throughout. You know?"). Similarly, investigators asked nearly every witness what they thought went wrong during the sweat lodge. *See, e.g.*, Transcript of Interview of Lou Caci by Det. Surak, 10/12/09, at 13:12-13 (Surak: "Yeah with the whole sweat lodge incident, what do you think happened?" Caci: "Well #1, I don't think it was run properly. And #2, he should have been, he should have looked after us better.").

Such opinions meet neither of Rule 702's criteria. They are not based on observations, but rather on an individual's emotions, personal beliefs, or speculation. Nor are they helpful to the jury. The question whether Mr. Ray was reckless or negligent depends on his knowledge on October 8, 2009, not on moral judgments that others have made after the fact.

No case the State cites suggests a contrary conclusion. In *State v. Doerr*, 193 Ariz. 56 (1998) for example, the police officer was permitted to offer a lay opinion on the truthfulness of statements the defendant made *to the officer* during questioning. The officer was a percipient witness, and his observations regarding the defendant's candor were deemed helpful to the jury because they explained why the State did not do more to pursue another perpetrator—a question to which the defense had opened the door. *See id.* at 63. Each of the other cases the State cites involves *expert* testimony given by police officers, and thus does not raise the same questions regarding non-percipient opinions. *See State v. Keener*, 110 Ariz. 462, 465-466 (1974) (involving police officer's expert opinion that drugs were for sale); *State v. White*, 26 Ariz. App. 505, 509 (App. 1976) (same); *State v. Gentry*, 123 Ariz. 135, 137 (1979) (involving police officer's expert opinion that defendant was driving at the time of the offense); *Bliss v. Treece*, 134 Ariz. 516, 518 (1983) (involving police officer's expert opinion that the plaintiff was following the defendant too closely).

III. CONCLUSION

The parties agree that opinions on the case's ultimate issues are not permitted unless they are admissible under the rules governing opinion testimony. The Defense submits that the ultimate-issue opinions the State has elicited to date do not satisfy these rules and must be excluded.

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